

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DATE FILED: 7/16/08

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TONI EDMONDS,

Petitioner,

08 Civ. 4388 (PKC) (AJP)

-against-

: **REPORT AND RECOMMENDATION**

ADA PEREZ, Supt.,

Respondent.

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ANDREW J. PECK, United States Magistrate Judge:

To the Honorable P. Kevin Castel, United States District Judge:

Presently before the Court is petitioner Toni Edmonds' motion for a "stay and abeyance" of her federal habeas corpus petition to allow her to exhaust the unexhausted claims in her mixed habeas petition. For the reasons set forth below, the motion should be DENIED and the Court should DISMISS Edmonds' habeas petition without prejudice.

ANALYSIS

Edmonds was convicted on November 21, 2005. (Dkt. No. 2: Pet. ¶ 2.) The First Department affirmed her conviction on March 27, 2007, and the New York Court of Appeals denied leave to appeal on May 15, 2007. (Pet. ¶¶ 9-10; see Edmonds 6/26/08 Aff. re Stay ¶¶ 1-2.) People v. Anonymous, 38 A.D.3d 438, 832 N.Y.S.2d 527 (1st Dep't), appeal denied, 8 N.Y.3d 981, 838 N.Y.S.2d 484 (2007). Under the AEDPA, the one year period in which a petitioner must bring a habeas petition begins to run 90 days after the New York Court of Appeals denies leave to appeal.

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Before that 90 day period had even expired, however, Edmonds brought a C.P.L. § 440 motion on or about July 6, 2007. (Pet. Ex. C: Edmonds 440 Motion Papers.) On January 4, 2008, Justice Roger Hayes denied Edmonds' § 440 Motion. (Pet. Ex. C: 1/4/08 Justice Hayes Decision; see Edmonds 6/26/08 Aff. re Stay ¶ 5.) On January 14, 2008, Edmonds promptly sought leave to appeal to the First Department from Justice Hayes' denial of her § 440 motion (Pet. Ex. D: 1/14/08 Edmonds Leave Application; see Edmonds 6/26/08 Aff. re Stay ¶ 6.) As of June 26, 2008, the First Department had not ruled. (Edmonds 6/26/08 Aff. re Stay ¶ 6.)

With this chronology, it is clear that Edmonds still has a year to bring a timely and fully-exhausted federal habeas petition.^{1/} In such a situation, a "Zarvela"^{2/} stay and abeyance of a mixed petition is neither necessary nor appropriate, and Edmonds' petition should be dismissed without prejudice. See, e.g., Pettus v. McGinnis, 04 Civ. 2619, 2005 WL 1163008 at *2 (S.D.N.Y. May 18, 2005) (Peck, M.J.), report & rec. adopted, 2005 WL 1338818 (S.D.N.Y. June 8, 2005).^{3/}

CONCLUSION

For the reasons stated above, Edmonds' motion for a stay should be DENIED and her petition should be DISMISSED without prejudice.

^{1/} If the First Department denied leave since June 16, 2008, Edmonds still would have over eleven months to timely file a habeas petition.

^{2/} Zarvela v. Artuz, 254 F.3d 374 (2d Cir.), cert. denied, 534 U.S. 1015, 122 S. Ct. 506 (2001); see also, e.g., Rhines v. Weber, 544 U.S. 269, 125 S. Ct. 1528 (2005).

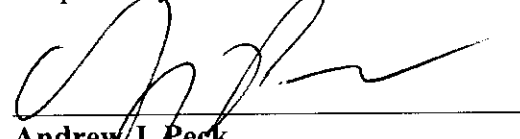
^{3/} See also, e.g., Sanchez v. Green, 02 Civ. 4803, 2003 WL 132538 at *3 (S.D.N.Y. Jan. 16, 2003) (Peck, M.J.); King v. Greiner, 02 Civ. 5510, 2002 WL 31453976 at *2-3 (S.D.N.Y. Nov. 5, 2002) (Peck, M.J.) (& cases cited therein), report & rec. adopted, 2003 WL 57307 (S.D.N.Y. Jan. 7, 2003).

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable P. Kevin Castel, 500 Pearl Street, Room 2260, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Castel (with a courtesy copy to my chambers). Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825 (1992); Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(d).

Dated: New York, New York
July 16, 2008

Respectfully submitted,


Andrew J. Peck
United States Magistrate Judge

Copies to: Toni Edmonds
Andrew M. Cuomo, Esq., Attorney General of the State of New York
Robert Morgenthau, Esq., District Attorney, New York County
Judge P. Kevin Castel